

that it will help them to compete.⁶⁰ These parties already overestimated the willingness of the market to support their bid prices and, as noted above, NextWave may even now regret asking for the suspension of payments in March. In addition, the Commission's Public Forum in this matter confirmed that dramatic relief still may not rescue a number of the troubled C block licensees.⁶¹ Lacking expertise of its own and supportable business plans from overextended bidders, this is hardly the situation in which the Commission should agree to forego the enforcement of its own rules and the collection of the public's money.⁶²

^{60.} Indeed, in an effort to avoid chasing these licensees into bankruptcy, the Commission ultimately might promote that very result. Section 61 of the Internal Revenue Code includes among the definitions of gross income "[i]ncome from discharge of indebtedness." 26 U.S.C. § 61(a)(12). Thus, retirement of outstanding indebtedness at less than its face amount results in taxable income to the debtor. In 1986, Congress amended Section 108 of the Internal Revenue Code to require solvent debtors to recognize debt-cancellation income currently, that is, in the year the cancelling transaction takes place. 26 U.S.C. § 108. Debt cancellation income is excluded from gross income in the case of Chapter 11 bankruptcy or where the taxpayer is insolvent. Id., § 108(a)(1)(A) & (B).

^{61.} See Bensché Remarks; Remarks of Brian O'Reilly, Managing Director, Toronto Dominion Bank.

^{62.} The Joint Commenters also note that, far from being powerless when a C block licensee seeks bankruptcy protection, the Commission may wield considerable authority as the largest secured and unsecured creditor. The Joint Commenters urge the Commission not to assume a passive role when overextended C block bidders seek bankruptcy protection. See 4 C.F.R. § 102.1(a) ("Each Federal agency shall take aggressive action, on a timely basis with effective followup, to collect all claims of the United States for money"). An analysis of the Commission's options in a bankruptcy proceeding is included as EXHIBIT C to this pleading.

V. SIMPLY PERMITTING OVEREXTENDED BIDDERS TO RETURN THEIR LICENSES IS UNFAIR TO RESPONSIBLE LICENSEES WHO ARE WELL INTO NETWORK CONSTRUCTION

Finally, Wireless Bureau officials asked for comment during the June 30, 1997, Public Forum on the merits of an "Amnesty Day," during which overextended bidders would be permitted to return their licenses with decreased penalties or no penalties at all.⁶³ The Joint Commenters oppose such an option. In addition to establishing a precedent that will be invoked by other overextended bidders in future auctions, the Amnesty Day concept is particularly unfair to broadband PCS C block licensees who are well into network construction and operation.

The Commission's rules provide that a defaulting licensee will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission, plus a penalty equal to 3 percent of the subsequent winning bid.⁶⁴ According to the Commission these rules are intended to "provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction."⁶⁵ In reliance

⁶³. See also R & S Comments at 13-14 (proposing the establishment of a period for return of C block licenses). The Joint Commenters oppose the Petition for Waiver filed by R & S.

⁶⁴. 47 C.F.R. § 1.2104(g)(1) & (2).

⁶⁵. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2382 (1994).

on these rules, a number of bidders in fact made certain of their financial capabilities before the C block auction and factored the cost of system construction into the maximum bid amounts under their business plans.

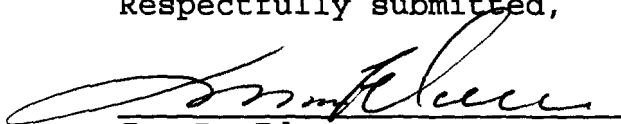
Now, those licensees have invested millions of dollars in system design and construction, have secured vendor financing, and have hired engineering and construction teams to build PCS networks. Some licensees even are providing service in various C block markets,⁶⁶ and more systems are expected to be launched shortly. These bidders heeded the Commission's warnings and took the steps to ensure system construction; having done so, however, they would effectively be excluded from utilizing an Amnesty Day. The Joint Commenters urge the Commission not to establish that its default rules apply at all times except for the occasional Amnesty Day and not to penalize licensees who planned for the exigencies of license ownership.

⁶⁶. Cook Inlet PCS launched service in Tulsa, Oklahoma, in early June. Airadigm is providing service in several markets in Wisconsin and Iowa.

VI. CONCLUSION

For these reasons, the Joint Commenters urge the Commission to lift the current suspension of broadband PCS installment payment deadlines, to deny all pending requests for anticipatory installment payment relief, to grant requests for grace period relief only where a licensee makes a clear and public showing of a commercially reasonable business plan to make its payments, and to reactivate defaulted licenses to responsible parties without delay.

Respectfully submitted,



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July 8, 1997

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EXHIBIT A

RCR

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Wireless stocks start to climb charts

By George Lurie

The whisper on Wall Street is turning into a roar.

Suddenly, telecom stocks are "hot" again, springing back to life in recent weeks following a painful and prolonged two-year slump.

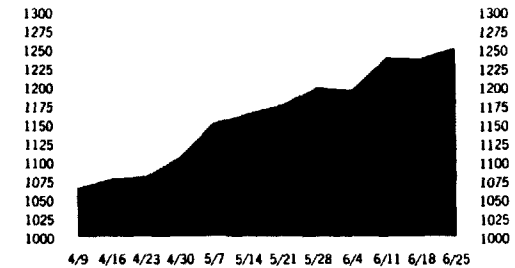
Telecom stocks—Wall Street darlings during the early 1990s—had been taking something of a beating the past few years as huge telco investments in licenses, infrastructure and marketing and a flood of new competitors, services and technologies cut deeply into many once high-flying companies' bottom

lines—and clouded future earnings projections.

"The past couple of years have been frustrating for a lot of telecom investors," said one financial analyst. "While the Dow set record after record, many telecom companies were not participating in the rally. After watching share prices remain flat—or in some cases, plummet—a lot of investors soured on the sector and decided to turn their attention elsewhere."

But in recent months, analysts and investors alike seem to have rediscovered their taste for telecom. Suddenly, telecom stocks are regaining their Wall Street

luster and muscling their way toward the front of the pack in Wall Street's un-



RCR's stock index

precedented bull run.

During the past 10 weeks, RCR's index

Turn to... **stocks**, Page 45

stocks

From Page 1

of 80-plus key telecom stocks has leapt nearly 200 points—or 15 percent. An increasing number of telecom companies have seen meteoric increases in the price of their stock in recent days. As of June 25, 28 RCR index companies were trading within 10 percent of 52-week highs while only five were hovering within 10 percent of 52-week lows. As of late last week, seven RCR index telcos were trading at 52-week highs.

On June 23, for example, a day when the Dow Jones Industrial Average took a nose dive of nearly 200 points, Geotek Communications Inc.—after announcing an alliance with IBM Corp.—saw its stock soar in value by nearly 30 percent. And industry heavyweight Motorola Inc., until recently referred to as “hi-tech’s fallen star,” has rebounded nicely from a mid-1990s slump and was trading late last week at \$76.75 per share, an all-time high.

Another sign of telecom’s resurgence: Financial buyers have begun targeting certain cellular sectors, snapping up “undervalued” telecom properties with relatively low price-to-earnings ratios and increasingly positive cash flows that make their current stock prices appear to be bargains. New York investment firm Blackstone Capital Partners’ \$718 million merger agreement with CommNet Cellular Inc. is the most recent example of this trend. (CommNet stock rose 15 percent follow-

ing the merger announcement.)

Even President Clinton is getting into the act, singling out the telecom industry for praise in a June 19 pre-Summit of the Eight speech in Denver—delivered outside the headquarters of Tele-Communications Inc.

Global deregulation also has sparked the industry, allowing aggressive telecom companies to tap vast new markets, fueling innovation and prompting strategic alliances and mergers that are driving cellular’s cost to the consumer down while pushing the technological envelope to greater and greater heights. (That Dick Tracy wristwatch doesn’t look so futuristic anymore, does it?)

Meanwhile, it’s difficult to read a newspaper, listen to the radio or watch television without being bombarded with pitches for cheap paging, cellular and personal communications services. While the early 1990s were boom years in terms of subscriber growth, the rate of overall cellular penetration during 1995 and 1996 slowed somewhat—a trend that analysts say contributed to telecom’s negative turnabout on Wall Street.

The 1996 telecom act helped kick cellular’s growth rate back into a higher gear and the total number of cellular users worldwide now is approaching the 100-million mark. Many analysts are forecasting 200 million subscribers by 2000 and an eventual overall worldwide cellular penetration rate of 40 percent—predictions, if true,

that likely will translate into higher profits for the telcos and greater returns for investors.

But the telecom horizon, while noticeably brighter in recent days, is far from cloud-free—a situation that, analysts say, continues to keep many potential investors on the sidelines. While generally optimistic about telecom’s short- and long-term future, analysts warn that a number of potential problems could throw a wet blanket over the current party. Among the issues generating the most concern: the financial instability of many C-block licensees, which has sullied the early success of the Federal Communication Commission’s spectrum auctions and the continuing evolution of PCS; unresolved health-related questions centering around whether there are potentially damaging effects of microwave radiation; and deregulation, which, while spurring competition and lower consumer prices, also has helped to create a general air of confusion in the consumer marketplace, as would-be cellular users are blitzed with a mind-numbing array of new choices—“turning many potential subscribers off before they have a chance to be turned on,” said one analyst.

“What we’ve seen [during the past few years] is a lot of confusion among investors about what’s going on in telecom,” said Perry Walter, an analyst with The Robinson-Humphrey Co. “But just in the past month, that confusion has turned into interest, especially in light of the

recent merger and acquisition activity we’ve been seeing.”

Walter’s telecom outlook is markedly upbeat. His top wireless stock picks: “Western Wireless—a company with strong management and cash flow that has been doing a good overall job of rolling out their network; InterCel Inc.—another company with strong management doing a good job of growing their PCS subscriber base; and Rural Cellular Corp.—creative rural cellular players in Minnesota and Maine with strong roaming revenues and some promising PCS partnerships with Aerial Communications.”

Bear Stearns Technology Group analyst David Freedman is also bullish: “After moving sideways to down for more than three years, the stocks of wireless telephony companies seem likely to enjoy positive performance in 1997 and 1998. By late 1997 or early 1998, we expect evidence to accumulate that supports our hypothesis that incremental penetration is accelerating and that the pricing level is not dropping dramatically. Consequently, we believe that investors will soon begin to consider the rapidly growing cash flow and earnings of cellular companies.”

Freedman’s top stock pick is 360° Communications Co., which spun off from Sprint Corp. in March 1996. The company’s stock has been trading in the \$17 to \$20 range and Freedman predicts it will go to \$26 by early 1998.

Bear Stearns wireless messaging analyst Jeanine

Oburchay’s top stock picks are Paging Network Inc. and Arch Communications Group Inc., “two of the best-managed [wireless messaging] companies,” said Oburchay, “and as the two largest viable competitors in the industry, they have the market share and the scale to implement successfully some new strategies that should make the business more economically sound.” PageNet, which has been trading in the \$8 to \$9 range, is well off its 52-week high of \$24.50. Arch has been trading in the \$7 to \$8 range, down more than two-thirds from its 52-week high of \$22.25.

A recent Prudential Securities report also forecasts “a resurgence of interest in wireless stocks after a terrible 1996, as investors look to wireless to become an integral portion of [consumers’] overall telecom budget.” Among Prudential’s top telecom stock picks: Northern Telecom Ltd. and Lucent Technologies Inc.

“Many investors are realizing competition can expand the wireless pie—not just divide it,” said Robinson-Humphrey’s Walter. “It’s early in the process and not everyone is jumping on the bandwagon. But a few more quarters of good performance is bound to attract additional investor interest.”

So while Wall Street’s spotlight appears to be shining again on telecom, it’s difficult to know how long the glow might last. Savvy market veterans agree on one thing—the good times, like the bad times, never go on forever.

EXHIBIT B

WIRELESS SECURITIES OFFERINGS

Transactions that were completed between the end of the broadband PCS C Block auction and today include:

PUBLIC OFFERINGS			
Date	Company	Transaction Type	Principal Amount (\$ in millions)
4/3/96	Vanguard Cellular	Debt	200
4/16/96	InterCel	Debt	360
4/25/96	American Portable Telecom	Equity	167
5/14/96	Cleartnet Communications	Equity	83
5/22/96	Western Wireless	Equity	207
5/22/96	Western Wireless	Debt	200
6/10/96	McCleod	Equity	240
7/11/96	AirTouch Communications	Debt	400
7/11/96	AirTouch Communications	Debt	250
7/30/96	PriCellular	Equity	25
10/2/96	AirTouch Communications	Debt	250
11/15/96	McCleod	Equity	146
4/24/97	SK Telecom	Debt	230

PRIVATE OFFERINGS

Date	Company	Transaction Type	Principal Amount (\$ in millions)
5/13/96	Millicom International	Debt	500
5/31/96	Occidente Y Caribe Cellular	Debt	100
6/13/96	Microcell Telecommunications	Debt	200
8/9/96	International Wireless Communications	Debt	100
9/12/96	Omnipoint	Debt	250
10/18/96	Western Wireless	Debt	200
10/30/96	PriCellular	Debt	170
11/21/96	Omnipoint	Debt	200
1/28/97	CCPR Services	Debt	200
2/26/97	McCleod	Debt	300
3/13/97	Winstar Equipment Co.	Debt	100
3/13/97	Winstar Communications	Debt	200
4/15/97	Comcast Cellular	Debt	1,000
6/15/97	InterCel	Debt	300
7/2/97	Price Comm Wireless	Debt	175

EXHIBIT C

BROADBAND PCS C BLOCK DEBTORS IN BANKRUPTCY

I. OVERVIEW

- A critical aspect of any bankruptcy proceeding regarding "C" block licensees is the dominant position of the FCC. The FCC's status as both the largest secured and unsecured creditor will make it extremely difficult, if not impossible, for the Debtors to confirm any plan of reorganization under the Bankruptcy Code without the FCC's support.
- This dominant position gives the FCC the ability — should it so choose — to assert that it will not compromise its rights to take the licenses, thereby foreclosing any reasonable likelihood of rehabilitation of the debtor.
- As discussed below, the FCC may, among other things, (i) seek relief from the automatic stay in bankruptcy, (ii) seek dismissal of the bankruptcy case, (iii) seek examination of the debtor, (iv) seek conversion of the case to a Chapter 7 liquidation, or (v) seek to obtain quick confirmation of a plan of reorganization on terms favorable to the FCC.

II. RIGHTS OF THE FCC IN A "C" BLOCK DEBTOR'S BANKRUPTCY

A. Relief From the Automatic Stay

1. In accordance with section 362(d) of the Bankruptcy Code, the FCC, as a secured creditor may seek relief from the automatic stay of section 362(a) of the Bankruptcy Code. If granted, such relief would allow the FCC to commence foreclosure proceedings with respect to the PCS Licenses. The basis for such relief would be the continuing depreciation in the value of the licenses, see 11 U.S.C. § 362(d)(1), or alternatively, that the debtor has no equity in the collateral and that the collateral is not necessary for an effective reorganization (because a successful reorganization is unlikely). See 11 U.S.C. § 362(d)(2). See, e.g., In re Hincley, 40 B.R. 679 (D. Utah 1984); see also United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc., 108 S. Ct. 626 (1988) ("There must be a reasonable

possibility of reorganization within a reasonable time").

2. The Bankruptcy Code also provides that actions to enforce a governmental unit's regulatory powers are not subject to the automatic stay. See 11 U.S.C. § 362(b)(4). Thus, to the extent that exercising its rights with respect to the licenses should be deemed an exercise of its regulatory powers, the FCC could exercise those rights notwithstanding the automatic stay.¹ The exercise of such regulatory powers would be predicated upon failure of a condition of the license — i.e., non-payment of the amounts due as required under the FCC rules. The analysis for considering a cancellation of the PCS Licenses to be an exercise of regulatory power by the FCC would be as follows:

- a. "A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's obligations under the installment payment plan." 47 C.F.R. § 1.2110(e)(4) (emphasis added).
- b. Because a petition in bankruptcy accelerates all debts as a matter of law, see 11 U.S.C. § 502(b), the licensee would not be in full and timely performance of its payment obligations — except for the FCC's suspension.
- c. If the suspension were lifted, the licensee would not have more than ninety days of delinquency, at which point it must file for grace period relief or else be in default. Section 1.2110(e)(4)(iii) of the FCC's rules provides: "Following expiration of any grace period without successful resumption of payment or upon denial of a grace period

¹ In exercising such regulatory powers a governmental unit may not discriminate against a debtor with respect to its rights as a licensee solely by reason of the debtor's bankrupt status. See 11 U.S.C. § 525(a) ("A governmental unit may not deny, revoke, suspend, or refuse to renew a license . . . [or] discriminate with respect to such a [license] against . . . a person that is or has been a debtor under this Title . . . solely because such bankrupt or debtor is or has been a debtor under this Title").

request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to part 1, subpart 0."

- d. Under section 362(b)(4) of the Bankruptcy Code, a non-discretionary act of a governmental unit enforcing such governmental unit's regulatory power "does not constitute an administrative action or proceeding against the debtor falling within the purview of section 362(a)(1) of the Bankruptcy Code." In re Gull Air, Inc., 890 F.2d 1255, 1263 (1st Cir. 1989) (treating the automatic withdrawal of aircraft landing slots from the debtor by the FAA). Cf. In the Matter of Fugazy Express, Inc., 114 B.R. 865, 872-74 (Bankr. S.D.N.Y. 1990) (distinguishing Gull Air on basis of discretionary acts by government unit).

B. Dismissal or Conversion of the Debtor's Bankruptcy Case

1. Pursuant to Section 1112(b) of the Bankruptcy Code, the court may, upon the request of a party in interest, for cause, convert a chapter 11 case to a chapter 7 case or dismiss the case outright,² whichever is in the best interest of creditors and the estate.
 - a. Section 1112(b) states that cause includes, among other things, a "continuing loss or diminution of the estate and absence of a reasonable likelihood of rehabilitation" and the "inability to effectuate a plan."
 - b. Accordingly, the FCC could argue that in light of (i) the continuing depreciation in the value of the licenses, and (ii) the lack of any reasonable chance of success in obtaining confirmation of a plan of reorganization, the continuation of the bankruptcy case is fruitless and a waste of resources and the case should, therefore, be dismissed or converted. See, e.g., In re

² If the licenses were to be sold outside of a plan of reorganization, the FCC would be able to "credit bid" against its claim in a reauction of the licenses pursuant to Section 363(k) of the Bankruptcy Code.

Woodbrook Assocs., 19 F.3d 312, 317 (7th Cir. 1994) ("The very purpose of § 1112(b) is to cut short this plan and confirmation process where it is pointless"); In re Humble Place Joint Ventures, 936 F.2d 814, 818 (5th Cir. 1991) (relief granted where "the risk to secured creditors of a continuing chapter 11 case outweighed the benefit").

C. The FCC Licenses are not Part of the Debtor's Estate

1. If the FCC licenses are not "property of the debtor's estate," the automatic stay does not apply to them. See 11 U.S.C. § 362(a)(3); In re Gull Air, Inc., 890 F.2d at 1263. The FCC and the courts normally take the position that FCC licenses are not "property" of licensees. See, e.g., Stephens Industries, Inc. v. McClure, 789 F.2d 386, 390 (6th Cir. 1986); In re Tak Communications, Inc., 138 B.R. 568 (Bankr. W.D. Wis. 1992), aff'd 985 F.2d 916 (7th Cir. 1993); In re Smith, 94 B.R. 220, 221 (Bankr. M.D. Ga. 1988); In re Merkley, 94 FCC 2d 829 (1983), recon. den., 56 R.R. 2d 413 (1984), aff'd sub nom. Smith v. Heckler, 776 F.2d 365 (D.C. Cir. 1985). Both the FCC and the courts, particularly bankruptcy courts, have taken differing positions in this issue. See, e.g., In the Matter of Fugazy Express, Inc., 114 B.R. 865 (Bankr. S.D.N.Y. 1990); In re Ridgely Communications, Inc., 139 B.R. 174 (Bankr. D. Md. 1992); In re Bill Welch, 3 FCC Rcd 6502 (1988).

D. Reclassification and Equitable Subordination

1. It appears that a number of the entities with the largest claims may have incurred such claims as a result of loans made to the Debtors because the foreign ownership limitations prevented them from making direct capital contributions. It is possible for a court to look past a "loan" label to the substance of the transaction and to reclassify a loan by an individual to a debtor as a contribution of capital instead of a loan creating a claim.
 - a. Such a reclassification of claims would be based upon the fact that (i) foreign ownership requirements limited the ability of such entities to participate directly as equity holders and instead such individuals lent funds to the Debtors and may have

received the right to convert such debt to equity in the event foreign ownership restrictions are relaxed; (ii) the Debtors were inadequately capitalized at the time it incurred the debt for the licenses, it is reasonable to assume that a large amount of its debt was simply disguised capital; and (iii) at the time of the advance it was unlikely that a bank would have been willing to lend funds to the Debtors. See, e.g., In re Trimble, 479 F.2d 103 (3d Cir. 1973); In re Interstate Cigar Co., Inc., 182 B.R. 675, 679 (E.D.N.Y. 1995) ("A significant test for capital contributions is whether a disinterested lender would have made such loans at the same time").

2. It is also possible for a court to equitably subordinate a creditor if it engaged in some type of inequitable conduct that resulted in injury to the other creditors.
 - a. Factors that could result in equitable subordination of certain creditors include, among other things, violation of foreign ownership limitations (for example, as discussed above, if foreign "creditors" were brought in as lenders solely to get around the legal limitations regarding foreign ownership), and allowing the company to incur debts that it clearly could not repay (see discussion below).

E. Piercing the Corporate Veil and/or Fraud

1. Courts are often willing to pierce the corporate veil if, among other reasons, a business is formed or operated with capital inadequate to meet the expected business obligations. See, e.g., U.S. v. WRW Corp., 986 F.2d 138 (6th Cir. 1992); Carpentry Health & Welfare Fund of Philadelphia and Vicinity by Grey V. Kenneth R. Ambrose, Inc. 717 F.2d 279 (3d Cir. 1983). Considering the Debtors' thin capitalization, the creditors may be able to pierce the corporate veil and reach the assets of the Debtors' equity owners. The bankruptcy court would probably look to the law of the situs of the bankrupt corporation or of the court.
2. If the Debtors committed any fraud in connection with obtaining the licenses, including representations made with respect to its financial

condition and bidding eligibility, the FCC would likely be able to revoke its licenses. In addition, Title 18 criminal sanctions may also be applicable.

F. Examinations

1. The Bankruptcy Code allows for the appointments of examiners and Bankruptcy Rule 2004 allows examinations, both of which can be used to, among other things, investigate the presence and merit of actions of the type discussed above.
2. Section 1104 of the Bankruptcy Code provides that upon request of a party in interest, the court shall appoint an examiner if such appointment is in the interest of creditors or for other cause. An examiner, once appointed, would investigate the debtor, its management and equity holders, to determine if, among other things, claims of the type described above exist.
3. Bankruptcy Rule 2004 allows for an examination of any entity. The scope of the examination may be broad in that it may extend to "the acts, conduct, or property or to the liabilities and financial condition of the debtor, or any matter which may affect the administration of the debtor's estate"

G. Propose Chapter 11 Plan

1. Another option would be for the FCC to propose, or jointly propose with other creditors or the creditors' committee, a chapter 11 plan which would transfer the licenses to a satisfactory third party (or even possibly the FCC).
 - a. The FCC would have to locate a third party willing to purchase the Debtors or all of their assets (in theory, the FCC could also serve as this party).
 - b. The FCC could seek to terminate the debtor's "exclusivity period"³ pursuant to section 1121(d) of the Bankruptcy Code to permit it to file a plan immediately.

³. The "exclusivity period" is the 120 day time frame within which only the debtor may file a plan of reorganization. This period may be reduced or extended by the court for cause.

- c. Once exclusivity is terminated, the FCC can file a Chapter 11 plan of reorganization which would detail the transfer of the debtor's assets to the third party purchaser and the proposed method of satisfying all outstanding debts.
 - i. The number and amount of claims may be significantly reduced if some of the larger creditors are reclassified as equity or equitably subordinated as discussed above.
 - ii. Creditors may be willing to take a relatively small distribution in respect of their claims considering the amount of the unsecured debt and the Debtors' prospects of confirming a plan.
 - iii. It is possible that equipment vendors and other contracting parties will be willing to take a minimal distribution on their claims if the purchaser were to continue to use their services or products.